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On European Macroeconomic Integration and the Ensuing Clash of Courts: Apropos the German Constitutional Court Ruling on the ECB's Public Sector Purchase Program

ABSTRACT – This short comment reveals the structural consequences resulting from the conflicting relationship between European law and macroeconomic integration. While the EU legal order was defined and shaped according to the concrete features required for the development and consolidation of the common market, in macroeconomic integration the role and function of law is different – precisely because its substantive content and formal features are out of alignment. The consequences of this mismatch are only now fully visible: political actors can resort to legal procedures, conveniently shaped to conform to microeconomic integration (preliminary reference), to promote by legal means their own macroeconomic agenda. This results in a clash of courts, each protecting their respective legal order on grounds of competence or primacy. Paradoxically, following a strict legal reasoning will only aggravate this legal conundrum. Hence, the answer must be political.

KEYWORDS – Macroeconomic integration, EU legal order, German Constitutional Court, European Court of Justice, Public Sector Purchase Program

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CONTENTS: *1. Introduction - 2. The formation of a legal order according to the rationale of microeconomic integration - 3. The conflicting rationales of the EU legal order and macroeconomic integration - 4. The unavoidable clash of courts in macroeconomic integration*

1. Introduction

The ruling of the Second Chamber of the German Constitutional Court (GCC) of May 5th has led the European integration process into uncharted waters.[1] For the first time since its formative years a national court has explicitly challenged the authority of EU law by opening a conflict regarding its primacy, one of the foundational principles of the EU legal order. Although different courts had explored the limits of this principle before, especially during the first decades of integration, since then it has been solidly established and generally accepted throughout the Union.[2] After the ruling of the GCC, it is debated whether it would still be the case, especially

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[1] BVerfG, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[2] See Danish Supreme Court judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A.*; or the *Taricco* saga: ECJ Judgment of 8 September 2015, *Taricco and others*, C-105/14, EU:C:2015:555, and ECJ Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936.

when taking into consideration eventual parallel reactions from courts in other Member States. All of this is object of intense legal academic discussion.

This brief comment will not engage in an assessment of the merits of the ruling. Hence, the reader shall not expect to find here neither a detailed analysis of the legal argumentation, nor an explanation of the ruling's meaning and relevance for the European integration at large or for the relation between national and EU legal orders in particular. The aim of these pages is rather to explain why and how was it possible to get to this situation. This in turn is expected to provide new insights on the relevance of the ruling from a more systemic perspective, therefore hopefully contributing to the full comprehension of its significance.

Critical in this task will be the distinction between the micro and macroeconomic layers of the economic constitution.[3] According to this understanding, the European treaties created first a stable framework for the development of private economic activities based on the four freedoms and the rules on competition (the microeconomic constitution) and later, with the signature of the Treaty of Maastricht, a framework guaranteeing the price stability of the common currency and the coordination of national economic policies (the macroeconomic constitution). The key idea on which this short comment relies is that the EU legal order, and especially its foundational principles, was established in close connection with the development of the microeconomic constitution. In other words, the objective of founding a common market under a free competition regime was operationalized in legal terms through the establishment of a new legal order resulting from the teleological interpretation of the provisions of the

[3] Following the reconstruction by Kaarlo TUORI and Klaus TUORI on the second chapter of their well-known monograph *The Eurozone Crisis: A Constitutional Assessment*, Cambridge University Press, Cambridge, 2014, and later developed in much depth by Kaarlo TUORI in *European Constitutionalism*, Cambridge University Press, Cambridge, 2015.

treaties. The ultimate question is to what extent that legal order, so closely aligned to the objectives of microeconomic integration, is still compatible with, and guarantees the smooth operation of, macroeconomic integration.

2. The formation of a legal order according to the rationale of microeconomic integration

The far from original premise of this comment is that the conformation of the EU legal order and the achievement of the (then) common market were processes inextricably linked to each other. The founding treaties were drafted with a clear objective in mind, and the legal features and content of the provisions therein were accordingly conceived to attain the common market goal. It is thus not surprising that in the legal argumentation of the rulings establishing the foundations of the EU legal order the European Court of Justice (ECJ) had relied on a teleological interpretation.[4] Important in this regard were the set of legal remedies designed by the treaty drafters in order to make its provisions actually effective, and in particular the preliminary ruling procedure. Due to the ability of national ordinary courts to enforce EU law and, in case of need, to resort to this procedure to consult the ECJ about the validity or interpretation of its provisions, a direct link between the various national and the newly founded (EU) legal orders was established. Because of this direct link, both the establishment and subsequent development of the EU legal order and the progress towards the common market were the result of a single process driven, to a good extent, by the ECJ's adjudication.

As it is well known, resulting from the ECJ's case law the EU legal order is autonomous from national legal orders, but at the same time relies on

[4] Two rulings deserve always to be mentioned: Judgement of 5 February 1963, *Van Gend en Loos*, 26/62, EU:C:1963:1 and Judgement of 15 July 1964, *Costa vs ENEL*, 6/64, EU:C:1964:66.

national procedures and institutions in order to unfold its full potential. This is not obstacle for EU law to prevail, within its scope of application, over national law (primacy) and, under certain circumstances, to entitle private actors with rights directly enforceable against public actors (direct effect). The result is a duality of legal orders, structured in such a way that the EU legal order supplements national ones in all instances related to the objectives of the treaties. Unavoidably, within this structure there are overlapping areas over which the final interpreters of each legal order (the ECJ on one hand, national Supreme or Constitutional courts on the other) claim to have full authority, thus resulting in potential conflicts of jurisdiction.

The classic example to illustrate these eventual conflicts is the saga of cases dealing with the protection of fundamental rights by EU law. To distil the many nuances of this case law into a single idea, it could be said that national ordinary courts faced reasonable doubts regarding the applicable legal regime when certain situations objectively falling under the scope of EU law resulted, precisely for that reason, on a notably lower standard of protection of fundamental rights than under national law. The German and Italian Constitutional Courts considered them a core element of its constitutional system which could not be affected by the acceptance of EU law's primacy over national law.[5] This potentially harmful conflict for the authority of EU law could be redirected by the ECJ through the homologation of its own standard of protection (from then on "inspired by the constitutional traditions common to the Member States")[6] to the standards guaranteed in the national context—thus observing the minimum threshold represented by the European Convention on Human Rights

[5] Bundesverfassungsgericht, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 2 BvL 52/71); Corte Costituzionale Italiana, Case 183/1973, 27 December 1973, *Frontini*.

[6] Judgment of 17 December 1970, *Internationale Handelgesselshaft*, 11/70, EU:C:1970:114, para. 4.

(ECHR).[7] Accordingly, since then "fundamental rights are enshrined in the general principles of Community law protected by the [ECJ]".[8] Hence, the solution to the conflict between the final interpreters of the national and the EU legal orders was the alignment of the substantive legal content in overlapping areas.

3. The conflicting rationales of the EU legal order and macroeconomic integration

A fair question would thus be why the current conflict between the GCC and the ECJ in respect of the Public Sector Purchase Program (PSPP) of the European Central Bank (ECB) could not be solved in a similar fashion, that is, by finding a common interpretation acceptable for the two legal orders. This short contribution aims at explaining precisely why this is not possible. But before getting to the specific details it is necessary to introduce, at least briefly, some of the challenges intrinsic to rule-based EU macroeconomic integration. Only then a comprehensive understanding of its structural problems will ensue.

Hence, it is important to note, first, that the very nature of law and that of macroeconomic management are difficult to reconcile: while the former aims to avoid arbitrariness and to guarantee legal certainty, the latter is discretional in essence. Applying legal rules to the management of redistributive issues leads to maladjustments that can only be solved either through the strict application of rules, thus assuming the suboptimal economic results and the unavoidable misalignment with constituents' policy preferences, or through the disregard of the rule of law, hollowing out

[7] Judgment of 14 May 1974, *Nold*, 4/73, EU:C:1974:51; and Judgment of 28 October 1975, *Rutili*, 36/75, EU:C:1975:137.

[8] Judgment of 12 November 1969, *Stauder*, 26/69, EU:C:1969:57, para. 7.

its very significance. The emergence of intermediate solutions, as soft-law and other innovations, only add to this basic tension.

Second, the Economic and Monetary Union (EMU) and the EU legal order are not in synch. Whereas the EU legal order was inextricably linked to microeconomic integration, the features of one reinforcing and causing the development of the other while pursuing the common market objective, this is not the case with macroeconomic integration. EMU law aims instead at petrifying a concrete political agreement about how to conduct monetary policy and the ensuing institutional arrangements. EMU provisions were designed in full awareness of the main principles of the EU legal order, which were already established and consolidated well before the signature of the Treaty of Maastricht. Consequently, when adjudicating on EMU-related issues the ECJ is in a rather defensive position *vis-à-vis* Member States, not only because it must protect the agreement enshrined in primary law instead of interpreting its provisions in a teleological way to achieve further goals, but also because the conditions for direct effect to be applicable are completely at odds with the aggregated character of macroeconomic integration. As a result, no advancements or new developments for the EU legal order are supposed to result from EMU case law.

And third, the distribution of competences in EMU radically differs from what was the case in microeconomic integration. Instead of shared competences, which justified executive federalism as specific mechanism of integration (supranational decisions implemented by national administrations), in EMU competences are exclusive either of the Union (monetary policy, assigned to the ECB) or national (general economic policies, although coordination between Member States is required to guarantee good operation of the single currency). The upshot is that there are no competence areas overlapping the Union and the national legal orders. This means that conflicts between jurisdictions are binary and cannot be solved through the adaptation of the content of EU or national

law to the requirements of the other, as was the case in microeconomic integration.

4. The unavoidable clash of courts in macroeconomic integration

Once all these elements are taken in consideration, it is possible to address a final issue that completes the full picture of the legal tension the GCC ruling has revealed. As a consequence of the exclusive nature of EMU competences (either national or European) legal disputes in macroeconomic integration across jurisdictions involve in last instance a conflict of competences. Whereas national Supreme or Constitutional courts are considering *ultra vires* arguments to determine to what extent the limits over the conferral of powers have been exceeded, the ECJ is required to justify (or not) the actual behaviour of EU institutions against the backdrop of the eventual damaging economic consequences of a declaration in the positive. Each court is thus rightly protecting its own jurisdiction through its role as final interpreter. The regrettable consequence is that the subsequent binary conflict does not allow for any kind of intermediate solution: for each court it is a matter of determining how the other jurisdiction has breached one of its basic constitutive rules—primacy and conferral of competences in the case at hand.

However, and this is key to understand the systemic magnitude of the conflict, no national Supreme or Constitutional court can avoid engaging in the dispute through self-restraint. Although the same principles and legal remedies apply in micro- and macroeconomic integration (the EU legal order is one and the same for both areas of integration), in the EMU private actors are only rarely entitled with EU rights. Accordingly, ordinary courts do not engage in a dialogue with the ECJ, and the only way for private actors to have access to the ECJ is by first reframing their demand as a fundamental rights claim. Once the dispute is framed as a clash between

national fundamental rights—or an equally basic provision of the national constitution—and EU law, the conflict can be redirected to the ECJ through the corresponding national Supreme or Constitutional court making use of the preliminary ruling procedure. Of course, only in very seldom circumstances will an economic actor with a genuine economic claim resort to this procedure. Instead, the misalignment between the EU legal order and macroeconomic integration has been fundamentally exploited by actors with political motivations, which for the first time have a (rather intricate but potentially damaging) access to the ECJ. The price to be paid for such a misalignment is thus the systemic conflict between jurisdictions it is destined to provoke.

As long as eventual conflicts are framed under the binary, either-or formula of constitutional conflicts within the national legal orders, Supreme or Constitutional courts, as their last interpreters, will defend the national legal order from what is perceived as an attack from the EU sphere. Gaining awareness of this systemic malfunction is thus a priority before national courts of last instance continue funnelling political conflicts to the legal system. However, it seems quite unlikely that they can refrain from protecting the system that constitutes their very reason of existence. In this regard, European integration has reached a limit by allowing political disagreement to be articulated in a legal form, thus transferring to courts what should be a political discussion. Although the solution to this conundrum seems not evident at all (especially if it must be articulated from the legal domain) it is peremptory for the future of European integration to find an adequate and comprehensive political, economic and legal response. Meanwhile lawyers can only wait for the next instalment of the unavoidable clash of courts.